No. 18-1395

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether the district court abused its discretion by denying petitioner's motion to intervene as untimely, where petitioner waited to move to intervene for nine months, during which it knew that its interests were implicated by this lawsuit and were not fully aligned with the interests of the existing parties.

PARTIES TO THE PROCEEDING

Petitioner Fraternal Order of Police Chicago Lodge No. 7 was a proposed intervenor in the district court and the appellant in the Seventh Circuit. Respondent State of Illinois was the plaintiff in the district court and an appellee in the Seventh Circuit. The City of Chicago was the defendant in the district court and an appellee in the Seventh Circuit.

RELATED CASES

- *State of Illinois v. City of Chicago*, No. 1:17-cv-06260, U.S. District Court for the Northern District of Illinois. Denial of intervention motion entered August 16, 2018.
- *State of Illinois v. City of Chicago*, No. 18-2805, U.S. Court of Appeals for the Seventh Circuit. Judgment entered January 2, 2019.

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BRIEF IN OPPOSITION

Petitioner Fraternal Order of Police Chicago Lodge No. 7 moved to intervene in this action after nine months during which it knew that its interests were implicated by this litigation and were not fully aligned with the interests of the existing parties. Moreover, petitioner filed its motion just as respondent State of Illinois and the City of Chicago—the original parties—were finalizing a proposed consent decree. After careful review of petitioner's motion and all relevant circumstances, the district court determined that the motion was untimely, and the Seventh Circuit affirmed. Shortly thereafter, the district court approved the consent decree in an order that specifically addressed and resolved the concerns that petitioner raised in its intervention motion. Nevertheless, petitioner seeks review from this Court based on its belief that the Seventh Circuit misapplied a properly stated rule of law to the particular facts of this case. Because the petition does not satisfy any of the certiorari criteria and because the Seventh Circuit's decision was correct, this Court should deny the petition.

STATEMENT

1. On August 29, 2017, respondent filed a lawsuit against the City of Chicago to enjoin it from "engaging in a repeated pattern of using excessive force, including deadly force, and other misconduct that disproportionately harms Chicago's African American and Latino residents." Doc. 1 ¶¶ 1, 2. In the complaint, respondent asserted that it considered a judicially enforceable consent decree to be the "only viable method" to achieve the necessary reform. *Id.* ¶ 193.

Petitioner immediately denounced the lawsuit. In a public statement made that same day, FOP President Kevin Graham asserted that entry of a consent decree would be "a potential catastrophe" and "will only handcuff the police even further." Doc. 75-1, Ex. B at 1. Graham reiterated this message in the FOP's September 2017 newsletter, where he published an article entitled "No Reason to 'Consent.'" Doc. 73-1, Ex. B. Among other concerns, Graham worried that negotiating a consent decree "could seriously threaten [petitioner's] collective bargaining rights." *Ibid.*

Two days after filing the complaint, the parties jointly moved to stay the proceedings "to continue settlement negotiations which, if successful, will take the form of a consent decree." Doc. 15 at 1. The district court granted the motion. Doc. 21.[1]

Although petitioner believed that the lawsuit and any consent decree could affect its collective bargaining rights, petitioner did not move to intervene. Instead, FOP's leadership opted to engage in a series of meetings with respondent. See Pet. App. 70a-80a (detailing communications between representatives of petitioner and respondent). During these meetings, respondent was clear that while it did not intend to interfere with petitioner's collective bargaining rights, respondent's interests were not fully aligned with petitioner's.

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[1] Nine months later, when petitioner filed its motion to hold the proceedings in abeyance pending ruling on its intervention motion, it would admit that the motion to stay, like the complaint, gave it "reason to believe that the consent decree will impact the collective bargaining agreement." Doc. 65 at 2.

In the very first meeting, for instance, Graham voiced his concern that a consent decree would affect "key provisions" of its collective bargaining agreement (CBA) with the City of Chicago and stated that petitioner would oppose any changes to CBA. *Id.* at 70a. In response, a representative for respondent stated that "there were many things in both parties' interests and that [respondent] would be as cooperative as it could be." *Ibid.* Respondent did not, however, assure full cooperation or suggest a complete alignment of interests.

According to Graham, respondent also indicated a concern about potential intervention by petitioner and "attempted to discourage such an action." *Id.* at 70a-71a. Although Graham does not provide any details about this alleged attempt, it is clear from petitioner's subsequent actions that petitioner was not persuaded that respondent was adequately representing its interests. On the contrary, petitioner continued to raise concerns about the proposed consent decree and its impact on the CBA.

In fact, at the very next meeting, in late September 2017, Graham "emphasized the opposition by the FOP for any changes in the [CBA]." *Id.* at 72a. And, in November 2017, petitioner's representatives described ongoing concerns that the consent decree might interfere with petitioner's collective bargaining negotiations with the City. *Id.* at 77a. In response, respondent informed petitioner that it "did not want to deal with 'core mandatory matters,'" which Graham understood to mean subjects that were topics of collective bargaining between respondent and the City of Chicago. *Ibid.* Graham believed that respondent's "willingness to

protect the interests of the officers' [CBA]" was "an attempt to persuade [petitioner] not to intervene in this case." *Id.* at 71a.

Also in November 2017, petitioner "formally objected" to respondent "having individual conversations with police officers on the basis that it was an attempt to bypass the role of [petitioner] as the exclusive collective bargaining representative." *Id.* at 78a. This is yet another indication that petitioner did not believe that its interests were fully aligned with respondent's. Nor did respondent act as though their interests were aligned; for example, when petitioner requested that respondent provide it with proposed consent decree language exchanged between the parties, respondent did not oblige. *Id.* at 74a.

By early 2018, talks between petitioner and respondent focused on whether and how to incorporate language in the proposed consent decree that would "carve out" topics that were the subject of petitioner's collective bargaining with the City. *Id.* at 78a. Petitioner's representatives stated that it was necessary to include a carve-out provision "to protect the language of the [CBA]." *Id.* at 79a. For its part, respondent repeated that it was "trying hard . . . not to impact the collective bargaining rights of the police officers." *Ibid.* Respondent did not, however, make any guarantees.

That spring, petitioner rejected the parties' invitation for it to join a Memorandum of Agreement that the parties had entered into with several community groups. Doc. 73 at 3; Doc. 73-1, Ex. A; Pet. App. 79a. This agreement afforded the signatories certain rights, including to receive a copy of the proposed consent decree prior to public release, as well as provide input and

raise objections to its terms before the parties submitted it to the court for approval. Doc. 73 at 3. The signatories also had the parties' agreement not to object to their standing to file motions or written comments on the adequacy of the proposed consent decree. Doc. 73-1, Ex. A.

By the end of May 2018, respondent had agreed to carve-out language "in principle." Pet. App. 80a. At the same time, respondent informed petitioner: "We have been consistent and do not believe that there are provisions we have drafted which conflict with the CBA." *Ibid.* (internal quotations omitted). In addition, respondent explained, "if any consent decree provisions conflicted with the [CBA, then] the [CBA] would control." *Ibid.* However, no final agreement regarding carve-out language was reached. *Ibid.*

2. On June 6, 2018, petitioner filed a motion to intervene as of right "based upon its substantial interest in the subject of this litigation which may, as a practical matter, impair or impede [petitioner's] ability to protect its collective bargaining representational interests." Doc. 51 at 1. Although petitioner had waited nine months since the filing of the complaint, during which time petitioner repeatedly expressed concerns about the impact of a consent decree on its collective bargaining rights, petitioner nevertheless asserted the motion was timely because "it had learned on May 15, 2018, that community groups . . . published and undoubtedly submitted to [respondent] a report that contains recommendations for the consent decree . . . [that] are extensive and adverse to the interests of [petitioner] and the employees it represents." *Id.* at 5.

The parties opposed the motion to intervene. Docs. 73, 75. As respondent noted in its response, petitioner failed "to enter this litigation in August 2017 when [respondent] filed its Complaint," instead waiting "until the moment that the parties have nearly finished negotiating a proposed consent decree." Doc. 73 at 1. Petitioner's clear goal, respondent asserted, was "to stop any consent decree, undoing hundreds of hours of negotiation and community engagement by the parties to the case." *Ibid.* Accordingly, the motion was not only untimely, but also prejudicial to the parties. *Id.* at 5.

Shortly after the parties filed their opposition, they released the 232-page draft consent decree and invited public comment. Doc. 81-2; Pet. App. 7a, 9a. The proposed decree included a paragraph acknowledging the relevant CBAs between the City and its law enforcement unions and a carve-out provision with three distinct protections: a "no modification" clause, a "no violation" clause, and a "best efforts" clause. Doc. 81-2 ¶¶ 686, 687; Pet. App. 8a-9a.

The "no modification clause" provided that "[n]othing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Unions; or (b) impair or conflict with the collective bargaining rights of employees in those units under" the Illinois Public Labor Relations Act (IPLRA). Pet. App. 8a, 51a. The "no violation" clause forbids any interpretation of the consent decree "as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process . . . , or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder." *Id.* at 8a, 51a-52a. And the "best efforts" clause states that in collective bargaining negotiations, "the

City shall use its best efforts to secure modifications to the CBAs consistent with the terms of this Consent Decree, or to the extent necessary to provide for the effective implementation of the provisions of this Consent Decree." *Id.* at 9a, 52a.

Following the release of the proposed consent decree, petitioner filed a reply brief that departed from the contents and reasoning of the intervention motion. Doc. 81. Among other variations, petitioner for the first time attributed its failure to intervene to respondent. *Id.* at 11-12. Petitioner attached an affidavit from Graham in which he averred that respondent had attempted to discourage petitioner from intervening in the fall of 2017. Pet. App. 70a-71a. Graham also averred that respondent assured petitioner that it did not intend for the proposed consent decree to deal with any topics subject to collective bargaining or otherwise affect the CBA. *Id.* at 71a, 77a. Petitioner thus argued for the first time that intervention was timely because it had not known that the consent decree was going to affect its collective bargaining rights until it received information from an unidentified confidential source in June 2018. Doc. 81 at 2, 11-12.

In response to this new argument, the district court ordered supplemental briefing on whether the carve-out provision adequately addressed petitioner's concerns. Doc. 82. The parties filed briefs explaining that the carve-out provision protected petitioner's rights because it "expressly forbids any interpretation of the Consent Decree that modifies or violates the terms of the applicable bargaining agreements" or any obligations under the IPLRA. Doc. 84 at 1.

3. Applying the four-factor test for determining whether a motion to intervene is timely under Federal Rule of Civil Procedure 24, the district court denied petitioner's motion as untimely. Pet. App. 12a (citing, inter alia, *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945 (7th Cir. 2000)). As to the first factor—the length of time petitioner knew or should have known of his interest in the case—the court acknowledged the allegations in Graham's affidavit, Pet. App. 12a, yet concluded that petitioner "must have known about its interest in the case when the complaint was filed, but delayed nine months before filing suit," *id.* at 13a. Given the clear request for a consent decree in the complaint, as well as the topics covered in its allegations, petitioner "did not need a draft consent decree or community groups' recommendations to recognize that this lawsuit could impact its members' interests." *Ibid.* (internal quotations omitted). And were there any doubt, petitioner's "own public statements immediately after the complaint was filed confirm that it recognized the profound potential impact of the requested consent decree on the interests of its members." *Id.* at 14a.

The court next found that intervention would prejudice the parties. *Id.* at 15a-16a. In particular, the parties had "deployed vast resources negotiating and drafting the proposed consent decree." *Id.* at 16a. And while this was underway, petitioner "declined the parties' invitation to provide input." *Ibid.* Thus, "to the extent the [petitioner's] interests have not been fully vetted in the drafting of the consent decree, that deficiency is at least in part a self-inflicted wound." *Ibid.*

Turning to the third factor, the court considered the prejudice to petitioner, noting that petitioner had "presented some evidence that parts of the current draft consent decree may conflict" with the CBA or state law. *Id.* at 19a. Nevertheless, the court reasoned, the parties had "expressed an intent to respect the CBA and the FOP members' collective bargaining rights," and, further, the carve-out provision should preclude any actual conflict. *Id.* at 19a-20a.[2]

Weighing these factors, the court reasoned that it "need not allow [petitioner] party status in this litigation when [it] chose to sit on the sidelines for nine months despite its clear recognition, as reflected in the public statements of its leadership, that the litigation could have a significant effect on policing in Chicago, including the CBAs." *Id.* at 27a. Petitioner's "decision to publicly oppose that relief—and correspondingly to limit its participation in the negotiation process despite invitations to join in more formally and comprehensively—appears to have been strategic, and it must live with the consequences of that decision." *Ibid.* Nevertheless, the court did not foreclose the possibility that it might grant petitioner leave to intervene in the future, stating that "if [its] assumptions about the future

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[2] Petitioner had not argued that its intervention motion satisfied the fourth factor—the existence of unusual circumstances—and the district court did not specifically address it in a separate section. See Doc. 51 (petitioner's argument that its motion for intervention satisfied the first three factors of the four-factor test).

course of this litigation . . . should turn out to be radically incorrect, nothing . . . would prevent re-examination of the matter of intervention." *Id.* at 27a n.5.

4. Petitioner appealed this decision to the Seventh Circuit, where petitioner again shifted gears, arguing for the first time that the unusual circumstances of this case warranted intervention. 7th Cir. Doc. 18 at 15. The Seventh Circuit rejected this new argument and affirmed the district court's decision.

First, the court agreed with the district court's finding on the first factor that petitioner "knew from the filing of the complaint that the consent decree might affect its interests." Pet. App. 44a. In fact, petitioner "tacitly admitted this when it relied on allegations in the complaint . . . in arguing to the district court that the intervention was necessary." *Ibid.* Also relevant was petitioner's public opposition to the entry of "any consent decree" at the time respondent filed its lawsuit. *Id.* at 36a.

The court also found unpersuasive petitioner's argument that it "reasonably relied on [respondent's] assurances that it was protecting [petitioner's] interests." *Id.* at 37a. The Seventh Circuit recognized that in prior cases, it had "indicated that intervention may be timely where the movant promptly seeks intervention upon learning that a party is not representing its interests," but found that the factual circumstances did not support that conclusion here. *Ibid.* (distinguishing *Sokaogon*, 214 F.3d 941; *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316 (7th Cir. 1995); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174 (3d Cir. 1994); *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989)). Where, as here "the intervenor has known

all along that its interests are directly pitted against those of the parties," courts do not "restart the timeliness analysis." *Id.* at 38a (internal quotations omitted).

Second, the court concluded that the prejudice to the parties if petitioner's motion to intervene were allowed at this late date is "manifest," especially in light of the "complex and well-publicized" settlement negotiations. *Id.* at 39a. The court rejected petitioner's argument that "the prejudice caused by the delay was minimal because it only waited several weeks from the time it determined its interests were at stake before filing its motion." *Id.* at 40a. This was not the correct analysis, the court reasoned, because the delay here began at the time respondent filed its complaint. *Ibid.*

Third, the Seventh Circuit determined that any prejudice to petitioner was both "largely speculative," *id.* at 43a, and less severe than in the cases on which petitioner was relying, *id.* at 40a, for several reasons. Unlike those other situations, petitioner "enjoyed repeated (and continuing) opportunities" to "convey its concerns to the district court at the [then-pending] fairness hearing." *Ibid.* Moreover, petitioner's rights were protected by the carve-out language in the consent decree and the requirement that the district court satisfy itself that the consent decree is "consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources." *Id.* at 41a. The court also reiterated that if petitioner's allegations of prejudice "are substantiated" by later events, the district court could reexamine intervention. *Id.* at 43a.

Fourth, the Seventh Circuit addressed petitioner's claimed "unusual circumstances." *Ibid.* As a threshold matter, it acknowledged the district court's failure to "consider this factor in a separate section," but held that this did not merit reversal. *Ibid.* Among other reasons, petitioner never "squarely presented" its theory to the district court, the argument was duplicative of the reliance argument addressed in the other factors, and the district court "considered the facts underlying the argument but found them unpersuasive." *Id.* at 43a-44a. Because all four factors weighed against petitioner, the Seventh Circuit denied petitioner's motion as untimely.

5. While the appeal was pending, the district court held a fairness hearing, received and reviewed public comments, and granted petitioner the right to submit briefing on the comments. Docs. 622-23, 644, 647, 702. In January 2019, the district court approved the proposed consent decree. Doc. 702.

In its decision, the district court again addressed petitioner's concerns that the consent decree "will impair CBA rights and displace protections provided by Illinois statutes." *Id.* at 11. The court noted that not only it but also the Seventh Circuit, as well as the "unions representing CPD sergeants, lieutenants, and captains," all had acknowledged that "the carve out language will protect the Unions from any attempt by the City to compel [them] to accept provisions of [the] decree which conflict with existing rights." *Id.* at 12 (internal quotations omitted). The court also reiterated that should an actual conflict arise, petitioner may pursue "all available avenues of relief, including bringing their disputes to this Court where appropriate." *Id.* at 14.

REASONS FOR DENYING THE PETITION

Petitioner waited nine months to file its motion to intervene, during which petitioner knew that its interests were implicated by this lawsuit and were not fully aligned with the interests of the existing parties. What is more, the motion was filed when the parties were at the cusp of releasing a proposed consent decree for public review and comment, following months of negotiations, discovery, and community engagement. After extensive briefing, the district court denied intervention. The Seventh Circuit then applied settled law to the unique facts of this case and held that the district court did not abuse its discretion. The Seventh Circuit's decision does not warrant further review.

To begin, this case does not satisfy the criteria for certiorari. Petitioner asserts that the decision below diverged from *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and created a circuit split. But the circuits are in agreement on the proper legal standard under *McDonald* for assessing the timeliness of a motion to intervene and on the requirement that courts must accept all non-conclusory allegations in the motion as true. There is therefore no split in authority for this Court to resolve.

In effect, petitioner is asking this Court to revisit the Seventh Circuit's resolution of the fact-bound questions of when petitioner knew or should have known that its interests were not aligned with the interests of the existing parties, and whether those interests were adequately protected under state law by the carve-out provision in the consent decree. This Court's certiorari jurisdiction, however, is not designed to review a purported misapplication of properly stated federal law.

See Sup. Ct. R. 10; *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015). And, in any event, the Seventh Circuit's resolution of these questions was correct.

Finally, this case is a poor vehicle to decide the question presented because even if this Court were to grant certiorari and reverse the Seventh Circuit's decision below, which affirmed the district court's holding that petitioner's motion to intervene was untimely, petitioner would still be required to show that it can satisfy the remaining requirements for intervention, none of which were passed on by the Seventh Circuit. For all of these reasons, this Court should deny the petition.

I. The Decision Below Does Not Conflict With Decisions Of Other Circuits.

Petitioner argues that certiorari review is warranted because the Seventh Circuit applied a "much more restrictive" test than this Court and other circuits apply to decide when the time against which an intervention motion is assessed for timeliness begins to run. Pet. 11. To the contrary, the Seventh Circuit correctly stated the governing rule and applied this settled law to the particular facts of this case.

The Seventh Circuit explained that "'[a] prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests *might* be adversely affected by the outcome of the litigation.'" *Id.* at 36a (emphasis in original) (quoting *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 31 F.3d 694 (7th Cir. 2003)). The court acknowledged, however, that in situations where the intervenor's interests were previously protected by an existing party, "intervention may

be timely where the movant promptly seeks intervention upon learning that [the] party is not representing its interests." Pet. App. 37a (collecting cases).

This notice standard is followed by all other circuits. The Fifth Circuit, for example, has stated that timeliness is measured "either from the time the applicant knew or reasonably should have known of his interest, or from the time he became aware that his interest would no longer be protected," depending on the specific facts of the case. *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996); *accord Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir. 1977) (whether would-be intervenor unreasonably delayed in seeking to enter class-action lawsuit should be assessed by considering when she learned not only of lawsuit but also that her interests "'would no longer be protected by the named representatives'").

Similarly, the First Circuit, has recognized that courts generally assess "actual or constructive notice of possible jeopardy," *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992), while also noting that where an intervenor had reason to think a party was "aggressively defend[ing]" her position, courts measure delay from when "she became aware" that was no longer the case, *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60, 65 (1st Cir. 2008).

All other circuits follow the same approach. See, *e.g.*, *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994); *Alcan Aluminum*, 25 F.3d at 1182; *Scardelletti v. Debarr*, 265 F.3d 195, 202-03 (4th Cir. 2001), overruled on other grounds, *Devlin v.*

Scardelletti, 536 U.S. 1 (2005); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 477-78 (6th Cir. 2000); *Heartwood, Inc.*, 316 F.3d at 701; *Reich*, 64 F.3d at 321-22; *Liddell v. Caldwell*, 546 F.2d 768, 770 (8th Cir. 1976); *Legal Aid Soc. of Alameda Cty. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010); *Walters v. City of Atlanta*, 803 F.3d 1135, 1150 n.11 (11th Cr. 1986); *United States v. AT&T Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

Because the Seventh Circuit correctly identified and applied the governing standard, there is no conflict for this Court to resolve and the petition should be denied on this basis alone. Nevertheless, petitioner urges that review is warranted because the decision below purportedly created a circuit split by assessing petitioner's delay from when it knew or had reason to know that "'its interests *might* be adversely affected by the outcome of the litigation,'" rather than when ''it became clear the interests . . . would no longer be protected.'" Pet. 11 (emphasis and ellipses in original); see also, *e.g.*, *id.* at 20 (arguing that the decision below "is directly contrary to" decisions of other circuits holding that "a party should not be expected to seek intervention if it has no reason to believe its interests would not be protected").

Petitioner misstates both the applicable test and the reasoning of the decision below. When assessing petitioner's delay, the Seventh Circuit held first that petitioner had reason to know that its interests might be implicated when the complaint was filed. Pet. App. 36a. Petitioner does not dispute this finding, which, in any event, flowed from a correct statement of the law. See, *e.g.*, *Banco Popular de Puerto Rico*, 964 F.2d at

1231 (assessing "knowledge of possible jeopardy"); *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 597 n.7 (2d Cir. 1986) (assessing when the intervenors "should have known the possible ramifications"); *Scardelletti*, 265 F.3d at 203 (determining when interests "might be impacted'); *Stallworth*, 558 F.2d at 267 (discussing when intervenors knew "their interests might be affected by a lawsuit"); *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 492 (6th Cir. 2014) (reviewing when "interest may be affected by the litigation"); *Walters*, 803 F.2d at 1150 n.16 (addressing when "interests could be adversely affected").

Instead, petitioner objects to the Seventh Circuit's next finding—addressing whether petitioner's interests were protected by an existing party and, if so, when it became clear that they were no longer protected. But here, too, the Seventh Circuit applied the settled standard. The Seventh Circuit considered and rejected petitioner's arguments that it promptly sought intervention "upon learning that a party [was] not representing its interests." Pet. App. 37a; see also *ibid.* (distinguishing "cases where the intervenor could not have reasonably anticipated that its interests were at issue or unrepresented until immediately prior to the attempted intervention"). The Seventh Circuit found that petitioner could not at any point have reasonably believed that its interests were represented by the existing parties. *Id.* at 38a-40a. Were this otherwise, there would have been no reason for petitioner to seek a carve-out provision. *Id.* at 38a. Nor would the parties have denied petitioner's requests to review draft consent decree provisions or participate in settlement negotiations. *Ibid.* These were among the "many

indicators" that petitioner's interests were not protected by the existing parties during the nine months it waited to file the intervention motion. *Ibid.*

For this reason, contrary to petitioner's argument, see Pet. 10-11, the Seventh Circuit did not depart from *United Airlines, Inc. v. McDonald*, 432 U.S. 394 (1977), a case involving permissive intervention under Rule 24(b). There, this Court held that although the interests of the intervenor (an unnamed class member) might have been implicated at the time the district court entered an order denying class certification, delay should not be measured from that time because "there was no reason for the [intervenor] to suppose that [the named plaintiffs] would not later take an appeal" from that order. *McDonald*, 432 U.S. at 394. Thus, the Court measured the time from when "it became clear to the [intervenor] that the interests of the unnamed class members would no longer be protected." *Ibid.* To the extent the Seventh Circuit here reached a different result than *McDonald* and the other cases cited by petitioner, it did so only because that result was dictated by the particular facts of this case.

Lastly, as for petitioner's argument that the Seventh Circuit "did not follow the well-established rule that the facts as asserted in a motion to intervene must be accepted as true" and, as a result, improperly "dismisse[d] [petitioner's] claims that it was misled into believing that [respondent] had no interest in interfering with [petitioner's] collective bargaining rights," Pet. 15, petitioner again misdescribes the decision below. The Seventh Circuit identified the correct rule, stating that it "'must accept as true the non-conclusory allegations of the motion.'" Pet. App. 35a (quoting

Lake Investors Dev. Grp. v. Egidi Dev. Group, 715 F.2d 1256, 1258 (7th Cir. 1983)). The court then applied this rule to the facts of this case and rejected petitioner's argument that it had been misled. Based on petitioner's own submitted facts about the carve-out provision, the draft consent decree proposals, and the settlement conferences, the court found that petitioner could not have reasonably believed its interests were protected by the parties. Pet. App. 38a. To the extent petitioner disagrees with the way in which the Seventh Circuit applied the correctly stated law to the facts presented here, those arguments are addressed below, see *supra* Section II.A.

II. The Seventh Circuit Did Not Err In Concluding That The District Court Acted Within Its Discretion In Denying Petitioner's Intervention Motion As Untimely.

As explained, all circuits, including the Seventh Circuit, apply the same test when determining whether a motion to intervene is timely. Moreover, as further explained, in the decision below the Seventh Circuit correctly identified this test as the applicable legal rule. That leaves only petitioner's argument that the Seventh Circuit misapplied this properly stated rule to the facts of this case. In effect, petitioner is asking this Court to revisit the Seventh Circuit's resolution of the questions when petitioner knew or should have known that its interests were not aligned with the existing parties', and whether those interests were adequately protected under state law by the carve-out provision in the consent decree. These fact-bound questions are not suitable for certiorari review, but, in any event, the Seventh Circuit resolved them correctly.

A. Petitioner Delayed Intervention For Nine Months During Which It Knew Its Interests Were Implicated And Were Not Aligned With The Interests Of The Existing Parties.

Although petitioner frames its argument on the first factor—the length of time from when it knew or should have known of its interest in the case—in a variety of ways, see Pet. 10-21, the crux of petitioner's position is that the district court abused its discretion by not measuring the delay from May or June 2018, when petitioner purportedly first learned its interests were not protected by respondent, *id.* at 11, 14-16, 18-19, 21. This argument—in all of its variations—is incorrect.

To begin, the Seventh Circuit rightly determined that petitioner "knew from the filing of the complaint that the consent decree might affect its interests." Pet. App. 44a. Petitioner made a public statement on the day the complaint was filed that described the requested consent decree as "a potential catastrophe." Doc. 75-1, Ex. B at 1. Shortly thereafter, Graham published an article asserting that the proposed consent decree "could seriously threaten our collective bargaining rights." Doc. 73-1, Ex. B.

That petitioner realized its rights might be affected at the time the complaint was filed is not surprising: the complaint detailed the many changes to policing in Chicago that respondent hoped to achieve through a consent decree. See Doc. 1. In fact, in its motion to intervene, petitioner impliedly admitted that the complaint contained sufficient information for it to know that its interests could be affected by this case. See Doc. 51 at 8-12 (citing at least 40 paragraphs in the

complaint as potentially impacting its bargaining rights); Doc. 65 at 2 (acknowledging that the parties' motion to stay, like the complaint, gave it "reason to believe that the consent decree will impact the [CBA]"). The Seventh Circuit did not err in holding that it was not an abuse of discretion for the district court to take petitioner's admissions—which only stated the obvious—at face value. Pet. App. 44a.

Nothing that happened over the next nine months changes this conclusion. On the contrary, petitioner met with respondent on several occasions to convey its position that a consent decree would necessarily implicate "key provisions" in the CBA. *Id.* at 70a; see also *id.* at 72a (emphasizing its "opposition" to any changes to the CBA). Petitioner also used these meetings to request a carve-out provision that would "protect the language of" the CBA. *Id.* at 79a. Had petitioner actually believed that the proposed consent decree had no potential to impact its rights, there would have been no reason for it to request a carve-out provision. *Id.* at 38a. Likewise, petitioner's requests to review draft consent decree provisions and participate in settlement negotiations, see *id.* at 80a, belie its argument that it did not appreciate the risk to its interests until May or June 2018. All told, the Seventh Circuit correctly concluded—based on the allegations in petitioner's motion—that the district court acted within its discretion in concluding that petitioner was acutely aware that its interests were implicated throughout the period after the complaint was filed.

For its part, petitioner argues that it did not know and could not have known that its interests were not being protected until an unidentified confidential source informed it that the draft consent decree would

impair its collective bargaining rights. Pet. 19. But the Seventh Circuit did not err in holding that there was no abuse of discretion in the district court's finding otherwise. To be sure, where the proposed intervenor's interests are initially aligned with an existing party's interests, courts should measure timeliness from the time the intervenor knows or should know the interests are no longer aligned, as the decision below recognized. Pet. App. 37a-38a. But that is not what occurred here, as the Seventh Circuit recognized.

As the Seventh Circuit explained, it is "hardly remarkable" that petitioner and the existing parties did "not share interests." *Id.* at 36a. Petitioner's own submission, which the Seventh Circuit accepted as true, confirms that respondent never suggested that its interests were fully aligned with petitioner's. Respondent rebuffed petitioner's requests to participate in court-led settlement negotiations and refused to give petitioner an early draft of the proposed consent decree. *Id.* at 80a. And when the subject of petitioner's interests arose, respondent stated that it "would be as cooperative as it could be," *id.* at 70a, and was "trying hard . . . not to impact the collective bargaining rights," *id.* at 79a. These are not statements suggesting that petitioner's and respondent's interests were fully aligned.

Petitioner speculates that respondent's "willingness to protect the interests" of petitioner's collective bargaining rights was "merely a veiled attempt to persuade [petitioner] not to intervene in this case." Pet. 5. The more likely reason, however, that respondent told petitioner that it did not believe the draft consent decree impacted any collective bargaining rights was

because, as discussed, see *infra* Section II.C., that representation was true. The court below was not required to give credence to an unsupported, speculative theory over this logical explanation supported by the plain text of the consent decree.

By contrast, in cases like *Reich*, see Pet. 15, 17, the information received by the proposed intervenors was untrue. There, the intervenors were told by their employer that it was "vigorously defending" their interests in litigation. *Reich*, 64 F.3d at 321-22. In reality, the employer did not comply with deadlines, "committed a litany of discovery violations," and failed to object to entry of default judgment. *Id.* at 317-18. And in *Alcan*, another case cited by petitioner, the district court had rejected the intervenors' motion on timeliness grounds without determining whether the consent decree would impact their rights. 25 F.3d at 1178. This was significant because the government had represented that the consent decree would not compromise the intervenors' claims. *Id.* at 1182. The court remanded to determine whether the government's representations were correct. Here, however, the Seventh Circuit compared the terms of the consent decree with the representations made by respondent, ultimately concluding that they were the same.

Nor are the facts of this case analogous to *Stallworth* or *McDonald*, as petitioner suggests. Pet. 10-11. In *Stallworth*, the court held that the intervenors—employees who were deprived of seniority rights by remedial provisions of a consent decree—could not have "fathomed the potential impact of this admittedly complex case" prior to entry of the consent decree. 558 F.2d at 260, 267. Likewise, in *McDonald*, the intervenors "had no reason to suppose" that the plaintiffs

would not take an appeal when the plaintiffs had attempted to bring an interlocutory appeal earlier in the litigation. 432 U.S. at 393-94. Here, by contrast, petitioner cannot show that it was similarly in the dark.

B. Petitioner Does Not Dispute That Intervention Would Prejudice The Existing Parties.

The Seventh Circuit also rightly concluded that district court did not abuse its discretion in finding that the prejudice to the original parties of allowing intervention at this late date is "manifest." Pet. App. 39a. This factor is often viewed as the "most important consideration in deciding whether a motion for intervention is untimely." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (internal quotations omitted). Courts give this factor yet additional weight where intervention would have had the effect of "derailing a lawsuit within sight of the terminal." *Sokaogon*, 214 F.3d at 949 (internal quotations and citations omitted); *Scardelletti*, 265 F.3d at 203 (finding prejudice where the intervenor "waited until the settlement negotiations were complete before seeking formally to intervene"); *Pitney Bowes*, 25 F.3d at 72 ("jeopardizing a settlement agreement causes prejudice to the existing parties").

At the time petitioner sought leave to intervene, the parties were on the brink of finalizing a proposed consent decree after expending significant resources on settlement negotiations, discovery, and community outreach for the better part of a year. Docs. 15, 38, 43, 53 (joint status reports). At best, allowing intervention at that stage would have halted that progress and

wasted the parties' substantial efforts. At worst, it could have unwound the entirety of the consent decree.

Petitioner does not dispute the weight given to this factor or the Seventh Circuit's conclusion that the parties would have been prejudiced by its intervention at such an advanced stage. Instead, petitioner asserts that the court should have measured the prejudice from May or June 2018, when it "learned that its interests were no longer protected." Pet. 24. According to petitioner, the Seventh Circuit's decision placed it in conflict with the Fifth Circuit, which held in *Stallworth* that "the only prejudice to be considered is that which would result from any delay in filing once the proposed intervenor knew or should have known its interests would be negatively impacted." *Id.* at 22. This is not correct. For the reasons discussed, the Seventh Circuit acted consistently with the Fifth Circuit by determining on the facts of this case that petitioner's delay should be measured from the time the complaint was filed.

C. The Prejudice To Petitioner Was Minimal And Largely Speculative.

Likewise, the Seventh Circuit did not err in determining that the district court acted within its discretion in finding that the prejudice to petitioner did not weigh heavily in favor of intervention. In particular, it held that the prejudice to petitioner was "largely speculative," Pet. App. 43a, because petitioner's rights were protected by the terms of the consent decree, governing law, and the consent decree approval process, *id.* at 41a-42a. Petitioner no longer disputes that the carve-out provision protects its rights under the CBA

and the IPLRA. Pet. 26-27. Instead, it confines its prejudice argument to two narrow points.

Petitioner first argues that the Seventh Circuit failed to address petitioner's appeal rights. *Id.* at 24-25. This is not true; the Seventh Circuit considered that argument and rejected it, explaining that "the inability to appeal the entry of a consent decree does not always mandate intervention." Pet. App. 40a. Indeed, where the proposed intervenor "can adequately convey its concerns to the district court at the fairness hearing, prejudice is often minimal." *Ibid.* Here, not only was petitioner able to present its concerns at the hearing and in post-hearing briefing, but the district court specifically addressed petitioner's arguments in its order approving the consent decree. Doc. 702 at 11.

Petitioner also asserts that the Seventh Circuit did not give sufficient consideration to its rights under state law. Pet. 25-26. At the threshold, whether the Seventh Circuit failed to afford appropriate treatment to petitioner's *state law* rights is not a question that merits this Court's review. And, in any event, petitioner is incorrect. The Seventh Circuit assumed for purposes of its analysis that "certain provisions of the draft consent decree conflict on their face with the CBA and Illinois law." Pet. App. 41a. The court recognized, however, that because litigants cannot "agree to disregard valid state laws," the state laws cited by petitioner govern, regardless of any purported ambiguities in the consent decree provisions. *Id.* at 42a.

In any event, none of the asserted conflicts between the consent decree and state law is real. First, petitioner claims that paragraphs 431 and 462 conflict with the Uniform Peace Officers' Disciplinary Act, see 50

ILCS 725/3.8(b). Pet. 26-27. But that Act permits parties to negotiate around its mandates in a CBA. 50 ILCS 725/6. Paragraph 431 simply requires the City to make best efforts to negotiate around the Act's mandates, and Paragraph 462 follows the requirements of the existing CBA. Pet. App. 49a.

Second, petitioner contends that paragraph 492 violates the Police and Community Relations Improvement Act, see 50 ILCS 727/1, because it does not require a state-certified homicide investigator to investigate officer-involved shootings or deaths, Pet. 27. This misstates the text of paragraph 492, which provides: "Criminal investigations into the actions of any CPD member relating to any 'officer-involved death' will comply with the Police and Community Relations Improvement Act." Pet. App. 50a.

Third, petitioner argues that paragraph 238, which allows for "periodic random review of officer's videos," *id.* at 48a, affects the Law Enforcement Officer-Worn Body Camera Act, which generally mandates destruction of video recordings after a 90-day storage period when those recordings have not been flagged for further retention for a statutorily enumerated purpose, 50 ILCS 706/10-20(a)(7). Pet. 27. Petitioner omits, however, the fact that paragraph 238 specifically requires retention of recordings in compliance with the Law Enforcement Officer-Worn Body Camera Act. Pet. App. 47a.

Fourth, petitioner claims that paragraphs 425 and 475 are inconsistent with Chicago Municipal Code provisions that prohibit anonymous complaints from being the subject of a disciplinary investigation unless the

allegation is of a criminal nature. Pet. 27; Chi. Municipal Code 2-84-330(D). Paragraph 425, however, states only that individuals are "allowed to submit complaints . . . anonymously," Pet. App. 48a; it does not speak to their use and does not require the initiation of disciplinary investigations. And paragraph 475 only requires the City to make best efforts to comply, *id.* at 50a, which signals that the requirements are subject to the obligations and limitations imposed by governing law.

D. Petitioner Failed To Identify Any Unusual Circumstances.

Finally, the Seventh Circuit did not err in its unusual circumstances analysis. For starters, petitioner did not present any unusual circumstances to the district court. Pet. App. 44a; see also Doc. 81 at 12-13. Accordingly, the Seventh Circuit correctly held that the district court did not abuse its discretion in failing to consider the unusual circumstances factor in a separate section of its order.

Moreover, petitioner's unusual circumstances argument—that it reasonably relied on respondent's representations that its interests would be protected, Pet. 29—is duplicative of the argument discussed in the first factor, Pet. App. 44a. Because the district court thoroughly assessed the "facts underlying th[is] argument" in its analysis of the first factor, there was no error. *Ibid.* As the Seventh Circuit reasoned, the standard "merely requires that the district court consider the appropriate factors and discuss them in detail sufficient . . . to review on appeal." *Ibid.*

III. This Case Is A Poor Vehicle For Resolving The Question Presented.

A party may intervene as of right only after establishing four criteria: (1) its motion was timely; (2) it possesses an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the existing parties are not adequate representatives of the proposed intervenor. Fed. R. Civ. P. 24(a)(2).[3] The intervenor bears the burden of establishing each criterion, and the "failure to establish any of these elements is grounds to deny" intervention. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007); see also *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) ("An applicant for intervention as of right must run the table and fulfill all four of these preconditions.").

Here, respondent argued below that petitioner's motion to intervene should be denied because it satisfied neither the first nor the third criterion. See 7th Cir. Doc. 22 at 53; Doc. 73 at 11. The Seventh Circuit did not address respondent's argument as to the third criterion, however. Accordingly, if this Court were to grant certiorari and find that petitioner's intervention motion is timely, on remand respondent would renew its argument that intervention should nevertheless not be allowed—because petitioner cannot show that the

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[3] In its petition, petitioner claims an entitlement to intervention as of right only. See Pet. 22.

disposition of this action threatens to impair its interests—making this a poor vehicle to resolve the question presented.

And, indeed, petitioner cannot show that the disposition of this action threatens to impair its interests. As explained, see *supra* Section II.C, petitioner no longer disputes that the carve-out provision in the consent decree protects its rights under the CBA and the IPLRA. Pet. 26-27. And, as further detailed, petitioner's more limited efforts to establish that the consent decree conflicts with its rights under Illinois law are misplaced. Equally important, as the Seventh Circuit and district court recognized, petitioner can bring a renewed motion to intervene should the trajectory of this litigation change or its fears become substantiated. Pet. App. 27a n.5, 43a. Nor is there anything to preclude petitioner from pursuing any other available remedies under the CBA or state law. See Doc. 702 at 14.

For these reasons, petitioner should not be allowed to intervene even if this Court were to conclude that the district court abused its discretion in holding that petitioner's intervention motion was untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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